No. 18-459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DARYL JOSEFFER
JONATHAN URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

GEORGE T. CONWAY III
Counsel of Record
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1260
gtconway@wlrk.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel contributed money to fund the brief's preparation or submission. Counsel of record for the parties received notice at least ten days before the due date of *amicus*'s intent to file this brief, and all parties have consented to the filing of this brief.

represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases under the federal securities laws.

The Chamber has a strong interest in this case because private securities class action litigation imposes a significant burden on its members and adversely affects their access to capital markets. In particular, its members frequently engage in mergers and acquisitions transactions. As a result, they face precisely the sorts of lawsuits that now invariably attend such transactions—including lawsuits brought in federal court under provisions of the federal securities laws, such as Section 14(e) of the Securities Exchange Act of 1934, the provision at issue here. By holding that private claims under Section 14(e) may be pleaded and proven by meeting only a negligence standard instead of a scienter standard, the decision below threatens to increase the litigation burdens faced by the Chamber's members. This case presents an appropriate opportunity for the Court to address that holding, and, indeed, for the Court to decide whether Section 14(e) affords any basis for private litigation at all.

SUMMARY OF ARGUMENT

The petition is absolutely right that there is a flat-out circuit split on the question of what state of mind is required to plead and prove a private claim for damages under Section 14(e) of the Securities Exchange

Act of 1934. In the decision below, the Ninth Circuit held that negligence sufficed. Pet. App. 2a, 20a. At least six other circuits—the Second, Third, Fifth, Sixth, Eighth, and Eleventh—disagree and require scienter. Pet. App. 10a–15a, 20a; Pet. 12–14; *Feldbaum* v. *Avon Prods., Inc* , 741 F.2d 234, 237 (8th Cir. 1984).

Subsumed within that question, however, is an even more fundamental issue that the Court should grant certiorari to address: whether a private right of action under Section 14(e) even exists *at all*. Pet. 20. Section 14(e) contains no private right, not even a hint of one. And when it comes to inferring private rights, this Court "swor[e] off the habit of venturing beyond Congress's intent" some four decades ago, and has repeatedly rebuffed "invitation[s] to have one last drink" ever since. *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). In inferring a private right under Section 14(e), the courts of appeals have simply ignored this Court's post-1975 precedents on private rights of action. Those precedents foreclose any recognition of a private right under Section 14(e).

For this Court to recognize that Congress created no private right of action under Section 14(e) would not, as a practical matter, substantially alter the status quo before the decision below. Tendering shareholders could still pursue claims of fraud under Section 10(b) and Rule 10b–5, which require scienter. Beyond this, as the tortuous history of Section 10(b) and Rule 10b–5 illustrates, inferring a private right under Section 14(e) could once again require this Court repeatedly to guess what Congress's hypothetical intent would have been in defining the scope of a cause of action Congress never intended to create—an awkward and difficult task, to say the least.

In any event, regardless of the ground upon which the Court may decide it, this case is unquestionably an important one. The difference between negligence and scienter matters a great deal in securities litigation. Reducing the state-of-mind requirement to negligence makes cases harder to dismiss, and thus increases their settlement value significantly. In turn, that has the effect of substantially increasing the costs faced by American companies when they engage in mergers and acquisitions transactions that involve tender offers—transactions of great importance to the American economy. Whether or not it chooses to decide whether a Section 14(e) private right should exist, the Court should hear this case.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SIX OTHER CIRCUITS ON WHETHER ANY IMPLIED RIGHT OF ACTION UNDER SECTION 14(e) MAY BE BASED MERELY UPON NEGLIGENCE.

The Ninth Circuit acknowledged that it "part[ed] ways from [its] colleagues in five other circuits by holding "that Section 14(e) of the Exchange Act" imposes a negligence standard." Pet. 20a. And indeed, as both the Ninth Circuit and petitioners explain at length, decisions from the Second, Third, Fifth, Sixth, and Eleventh Circuits all require scienter—and thus directly conflict with the decision below. Pet. App. 10a–15a, 20a; Pet. 12–14. There is yet even another circuit in conflict—the Eighth, which has held that "some element of deception or misrepresentation"—"'intentional ... conduct designed to deceive or defraud investors'"—"is essential to a valid Section 14(e) claim." *Feldbaum*, 741 F.2d at 237.

For the reasons explained in the petition, this seven-circuit split, without more, urgently necessitates this Court's review.

II. THE DECISION BELOW, BY RECOGNIZING A PRIVATE RIGHT OF ACTION UNDER SECTION 14(e), CONFLICTS WITH THIS COURT'S PRIVATE-RIGHT JURISPRUDENCE.

But there is another reason why the Court should hear this case. The Ninth Circuit's holding, and those of other circuits recognizing a private right of action under Section 14(e), contravene over four decades of decisions of this Court governing the judicial creation of private rights of action—decisions that make clear that "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017) (quoting *Sandoval*, 532 U.S. at 286–87). Section 14(e) contains no express right of action in its text, and nothing in the statute otherwise suggests any Congressional intent to create such a right. The Court should grant certiorari to conform the lower courts' treatment of Section 14(e) to the law this Court has long pronounced on private rights of action.

A. Since 1975, this Court has made clear that private rights of action may not be inferred without an indication of Congressional intent.

"In the mid-20th century, ... the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose," and so, "as a routine matter with respect to

statutes, the Court would imply causes of action not explicit in the statutory text itself." *Abbasi*, 137 S. Ct. at 1855 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). But the Court has taken far "more restrictive views on private rights of action in recent decades." *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting from dismissal of writ of certiorari as improvidently granted). "The high-water mark for implied causes of action came in the period before [this] Court's 1975 decision in *Cort* v. *Ash*"—but ever since then, the "Court has been very hostile to implied causes of action." *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.); *see Cort* v. *Ash*, 422 U.S. 66, 77–85 (1975).

The reason for this hostility is that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"—a point that this Court has "'recently and repeatedly'" emphasized in numerous "precedents [that] cast doubt on the authority of courts to extend or create private causes of action." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004)). Indeed, "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abassi*, 137 S. Ct. at 1857. And because "[d]eciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law," "the right answer" as to who should do that "'most often will be Congress.'" *Jesner*, 138 S. Ct. at 1413 (Gorsuch, J., concurring in part and concurring in the judgment; quoting *Abassi*, 137 S. Ct. at 1857).

Accordingly, under the approach the Court has taken toward inferring rights of action for over four decades now, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. Thus, "what must ultimately be determined is whether Congress intended to create the private remedy asserted, as [the Court's] decisions have made clear." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979). "Statutory intent on this latter point is determinative," for "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286–87.

B. There is no basis to infer a private right under Section 14(e).

Under these standards, the Ninth Circuit's recognition of a private right of action under Section 14(e) is erroneous, and this Court should grant certiorari to hold precisely that.

The Ninth Circuit is one of several courts of appeals that have inferred a right of action under Section 14(e)—but not one of those courts has properly applied this Court's post-*Cort* v. *Ash* case law to Section 14(e). The circuits that initially inferred a private right of action under that section did so not long before the "*ancien regime* ... for discerning and defining causes of action" fell in 1975. *Sandoval*, 532 U.S. at 287. These courts simply *assumed*, without analysis, that such a private right existed, and went straight to the question of identifying who had standing to assert it. *See, e.g.*, *Elec. Specialty Co.* v. *Int'l Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 595–

96 (5th Cir. 1974). In keeping with the law at the time, these courts saw "no need to try to discover 'supposed legislative intent.'" *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 361 (2d Cir. 1973).

But even after 1975, the courts of appeals failed to come to grips with the changed law governing private rights of action. They continued to "allow[] suits for private enforcement of section 14(e)"—and did so "without extensive discussion." *Plaine* v. *McCabe*, 797 F.2d 713, 717 n.7 (9th Cir. 1986). The courts of appeals simply assumed, or continued to assume, the existence of a right of action under Section 14(e) in favor of shareholders without *any* analysis under this Court's cases *at all*. *See, e.g.*, *Gearhart Indus., Inc.* v. *Smith Int'l, Inc.*, 741 F.2d 707, 714 (5th Cir. 1984); *Feldbaum* v. *Avon Prods., Inc.*, 741 F.2d 234, 236–38 (8th Cir. 1984); *Polinsky* v. *MCA Inc.*, 680 F.2d 1286, 1290–91 (9th Cir. 1982); *Staffin* v. *Greenberg*, 672 F.2d 1196, 1201–07 (3d Cir. 1982); *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430–31 (6th Cir. 1980); *Ind. Nat'l Bank* v. *Mobil Oil Corp.*, 578 F.2d 180, 184–85 (7th Cir. 1978); *Stull* v. *Bayard*, 561 F.2d 429, 432 (2d Cir. 1977).

Had these courts correctly conducted the analysis they elided, they would have concluded that, under this Court's precedents, no basis exists for inferring a private right of action under Section 14(e). In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 24–42 (1977), the Court held that no implied right of action existed in favor of defeated tender offerors under Section 14(e). The Court in *Piper* expressly "limited" its "holding" to whether such offerors could sue, and "intimate[d] no view" on "[w]hether shareholder-offerees ... have an implied cause of action under § 14(e)." *Id.* at 42 n.28. Still, the Court's reasoning in

Piper, along with its reasoning in later cases—in particular, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568–79 (1979), which found no private right for damages under Section 17(a) of the Exchange Act, and *Transamerica*, 444 U.S. at 19–24, which found no private right for damages under Section 206 of the Investment Advisers Act of 1940—plainly forecloses any recognition of a private right of action under Section 14(e).

In deciding whether a private right should be inferred, the judicial "task is limited solely to determining whether Congress intended to create the private right of action asserted by [the plaintiffs]. And as with any case involving the interpretation of a statute, [the] analysis must begin with the language of the statute itself." *Touche Ross*, 442 U.S. at 568. Section 14(e), on its face, "makes no provision whatever for a private cause of action." *Piper*, 430 U.S. at 24. It contains simply a prohibition—a prohibition against, among other things, making "untrue statement[s] of material fact, "omit[ting] to state ... material fact[s] necessary in order to make ... statements made ... not misleading," and "engag[ing] in any fraudulent, deceptive, or manipulative acts or practices," all "in connection with any tender offer or request or invitation for tenders." 15 U.S.C. § 78n(e). Thus, Section 14(e) "does not, by its terms, purport to create a private cause of action in favor of anyone." *Touche Ross*, 442 U.S. at 569. Section 14(e) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." *Transamerica*, 444 U.S. at 19.

Nor does the fact that Section 14(e) proscribes certain conduct ("fraudulent activities 'in connection with any tender offer,'" *Piper*, 430 U.S. at 38 (quoting 15 U.S.C. § 78n(e)), or the fact that it "protect[s] [a] class

of shareholder-offerees," *id.*, establish a private right of action. In *Transamerica*, Section 206 of the Investment Advisers Act similarly prohibited fraudulent conduct: Among other things, it "broadly proscribes fraudulent practices by investment advisers, making it unlawful for any investment adviser 'to employ any device, scheme, or artifice to defraud ... [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" 444 U.S. at 16 (quoting 15 U.S.C. § 80b–6). In addition, Section 206 protected a class of investor-victims; as the Court put it, "Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited." *Transamerica*, 444 U.S. at 24.

None of that mattered. "[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." *Id.*; *see also Touche Ross*, 442 U.S. at 578 ("the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf"). The Court concluded: "The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end." *Transamerica*, 444 U.S. at 24.

The inquiry could indeed end here for Section 14(e) as well, but more can be said. The legislative history of the Williams Act of 1968, which added Section 14(e) to the Exchange Act, contains no suggestion that any members of Congress believed that the legislation they were enacting would create any right to sue. *See, e.g.*, *Piper*, 430 U.S. at 26–34 & n.20; H.R. REP. NO. 90–

1711, at 7–14 (1968); S. REP. NO. 90–550, at 7–11 (1967).

As for what Congress actually enacted, the remainder of the Williams Act—as well as the rest of the Securities Exchange Act and the securities laws generally—confirm that no right of action should be judicially created for Section 14(e). For one thing, the securities laws are chock-full of prohibitions of various sorts against fraud and deception and manipulation and misstatements and omissions and failures to comply with a myriad of regulations, and they contain as well a potpourri of prescriptions designed to protect investors. But apart from the provisions in the securities laws that expressly provide for private rights to sue, no provision in those laws gives any more or less of an indication of a congressional intent to authorize private suits than does Section 14(e). In *Touche Ross*, the Court quite understandably refused to infer a right of action in part because to do so would mean "that virtually every provision of the securities Acts gives rise to an implied private cause of action"—a result the Court "decline[d]" to accept. 442 U.S. at 560. That same logic should apply to Section 14(e) as well.

At the same time, the express rights of action in the securities laws themselves establish why an inferred right under Section 14(e) must be rejected. Today there are "eight express liability provisions contained in the 1933 and 1934 Acts": Sections 11, 12, and 15 of the Securities Act of 1933, and Sections 9, 16, 18, 20, and 20A of the Securities Exchange Act of 1934. *Musick, Peeler & Garrett* v. *Emp'rs Ins. of Wausau*, 508 U.S. 286, 296 (1993); *see* 15 U.S.C. §§ 77k, 77*l*, 77*o*, 78*i*, 78p, 78r, 78t, 78t–1. Each of the express rights very precisely defines who may sue, whom they may sue,

for what, and under what circumstances. As this Court has repeatedly recognized, these are "carefully drawn express civil remedies" that contain "carefully drawn procedural restrictions" that "Congress regarded ... as significant." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195, 210 & n.30 (1976); *see also Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 380 (1982); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

These express rights of action thus cut strongly against judicially engrafting an additional one onto Section 14(e). "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19. And "[o]bviously, ... when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Transamerica*, 444 U.S. at 22 (quoting *Touche Ross*, 442 U.S. at 572). Congress didn't do so in Section 14(e), or, for that matter, anywhere in the Williams Act—which means that it didn't mean to. For "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* at 20 (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). "The fact that it enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor." *Id.* at 21.

That the courts of appeals have ignored the Court's precedents for so long, moreover, should not deter the Court from applying them here. In the case of Section 10(b) and Rule 10b–5, as to which the Court, of course,

has recognized an inferred private right, "this Court simply acquiesced in [a] 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)." *Touche Ross*, 442 U.S. at 577–78 n.19. Most significantly, that acceptance occurred at a time when, under the governing law as set forth by this Court, judicial creation of private rights was "routine." *Abbasi*, 137 S. Ct. at 1855; *see Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (one-sentence footnote acquiescing in 10(b)/10b–5 private right); *Kardon* v. *Nat'l Gypsum Co.*, 69 F. Supp. 512, 513–14 (E.D. Pa. 1946) (first judicial decision inferring 10(b)/10b–5 private right). No comparable history exists, however, for Section 14(e): This Court hit the brakes on inferring rights of action only seven years after Congress passed the Williams Act. *See Cort* v. *Ash*, 422 U.S. at 77–85. Just four years after that, as shown above, the Court effectively made clear that judges should not infer any more private rights of action under the federal securities laws. *See Touche Ross*, 442 U.S. at 568–79; *Transamerica*, 444 U.S. at 19–24. Indeed, by then the Court had "sworn off the habit of venturing beyond Congress's intent" altogether. *Sandoval*, 532 U.S. at 287.

C. Inferring a private right under Section 14(e) is unnecessary because Section 10(b) will continue to provide a remedy for fraud in tender offers.

If it is rejected by this Court, the Section 14(e) private right would not be sorely missed by anyone. Indeed, its elimination would work no substantial change in the conduct of securities litigation in the lower courts. As so many courts have been wont to say, "[t]he elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section

10(b)/Rule 10b–5 elements." *Flaherty & Crumrine Preferred Income Fund, Inc.* v. *TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) (citing *Smallwood*, 489 F.2d at 605), *quoted in* Pet. App. 14a. At least until the decision below, the courts inferring a Section 14(e) private right had understood that the elements of a claim "are essentially the same under § 14(e) as under Rule 10b–5," "except that § 14(e) applies to tender offers rather than the purchase or sale of securities." *Gulf & W. Indus., Inc.* v. *Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 696 (2d Cir. 1973). Because a tender of shares into a tender offer plainly constitutes a sale of securities under Section 10(b), the private right of action under Section 10(b) and Rule 10b–5 provides a full remedy for claims of fraud by tendering shareholder-offerees.[2]

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[2] Some courts have suggested, at least in dicta, that *non*tendering shareholders may sue under Section 14(e) if, somehow, they were deceived into *not* tendering. *See, e.g.*, *Stull*, 561 F.2d at 432; *Smallwood*, 489 F.2d at 596. To permit such claims, however, would inadvisably disregard the purchaser-seller rule imposed by this Court under Section 10(b) in *Blue Chip Stamps*, 421 U.S. at 731–55. That rule is based not on the text of Section 10(b), but on the Court's concern that "vexatious litigation" would ensue if plaintiffs were allowed to assert fraud claims after they had "decided *not* to purchase or sell stock"—claims not "capable of documentary verification." *Id.* at 740, 746. In any event, such claims under Section 14(e) appear to be few and far between, and it is easy to see why. Suppose a company were subjected to a hostile tender offer at $10 per share, and its management, unscrupulously seeking to defeat the tender offer, disseminated false information that pumps the stock up to $12—which had the desired effect because no rational shareholder would tender at $10 when she could sell into the market at $12. After all this, *no one* could bring a viable Section 14(e) non-tendering holder claim: Anyone who sold into the market at $12 would obviously have *no* damages, having profited from the fraud; and anyone who *refused* to sell into the market at the *higher* $12 price could not credibly

Beyond this, the proper application by this Court of its private-right precedents to Section 14(e) would promote stability in the law. Litigants and courts could rest assured that exceptions to those precedents, and to other doctrines in other areas of law, will not be created through oversights or accidents of history in the lower courts. In addition, as the tortuous, decades-long history of defining the Section 10(b)/Rule 10b–5 private right makes clear, the judicial manufacture of a private right under the securities laws brings with it the need to answer a seemingly endless array of "questions about the elements of the [inferred] liability scheme"—questions that "ha[ve] posed difficulty," of course, "because Congress did not create [the inferred] cause of action and had no occasion to provide guidance about [its] elements." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172–73 (1994).[3] As this case makes clear, there can be no guarantee that lower courts will continue to define the contours of Section 14(e) consistently with those of Section 10(b) and Rule 10b–5—which means

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claim that they *would* have sold to the tender offeror at the *lower* $10 price. The only shareholders with a potentially viable securities-fraud claim would be those who *purchased* in the open market at the fraudulently inflated $12 price. Assuming they ultimately suffered a loss, these *purchasers* would have a claim under Section 10(b) and Rule 10b–5.

[3] As one commentator put it in 2014: "The task of defining the implied section 10(b) private right of action ... falls to the judiciary, and the complexity of that task is reflected, in part, by the fact that there are at least twenty-eight Supreme Court opinions interpreting the scope of the section 10(b) right of action. Defining the elements of this cause of action and continuing to manage its evolution have consumed a non-trivial portion of the Supreme Court's energy." Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 324–26 & n. 85 (2014) (citing cases).

that the "awkward task of discerning [what standards] Congress intended courts to apply to a cause of action it never knew existed" may continue to arise. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359 (1991). By granting review and applying its private-right precedents here, this Court can obviate the heavy burden of determining the elements of yet another complex, judicially-created liability scheme.

III. THE QUESTION PRESENTED BY THIS CASE IS IMPORTANT.

Whether it tackles the threshold private-right issue or not, the Court should review this case because of its exceptional importance. For decades, this Court has frequently acknowledged the threat of abuse and unfair settlement pressures that often attend securities class actions. "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps*, 421 U.S. at 740. Indeed, "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.*

These concerns underscore the importance of the difference between the scienter standard imposed by most circuits in private cases under Section 14(e) and

the negligence standard selected by the Ninth Circuit here. Indeed, in deciding that scienter was required under Section 10(b), this Court, while relying on the text of the statute for its holding, also observed that a negligence standard could lead to an "'inexorable broadening of the class of plaintiff who may sue in this area of the law'" and "'ultimately result in more harm than good.'" *Ernst & Ernst*, 425 U.S. at 214–15 n.33. It was for much the same reason, indeed, that Congress enacted the requirement in the Private Securities Litigation Reform Act of 1995 that "plaintiffs must 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (quoting 15 U.S.C. § 78u–4(b)(2)). In the case of Section 10(b), of course, that means scienter. Congress intended that pleading standard as a "procedural protection[] to discourage frivolous litigation," namely, "abusive and manipulative securities litigation," "lawyer-driven lawsuits" in which "innocent parties are often forced to pay exorbitant 'settlements,'" including "extortionate 'settlements' ... extracted from issuers." H.R. CONF. REP. 104–369, at 32 (1995). Congress considered that standard ultimately to be a means "to protect investors, issuers, and all who are associated with our capital market" from such litigation. *Id.*.

The need for strictly enforcing a scienter standard under Section 10(b) applies with equal force under Section 14(e), and to litigation involving tender offers. One well-publicized phenomenon in securities litigation in recent years has been the growth in frivolous and abusive lawsuits attending the announcement of mergers and acquisitions, transactions that frequently involve tender offers as

a component. As the U.S. Chamber of Commerce's Institute for Legal Reform recently explained:

> Here's how it works: Just about every merger or acquisition that involves a public company and is valued over $100 million—91% of all such transactions in 2010 and 2011—becomes the subject of multiple lawsuits within weeks of its announcement. Because the parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly—within three months—and typically provide little or no benefit for shareholders. But the settlements do award large attorneys' fees to the lawyers who filed the lawsuits.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, THE TRIAL LAWYERS' NEW MERGER TAX 1 (2012) ("MERGER TAX"), *available at* http://bit.ly/2qAaVUZ.

This genre of litigation quickly became a growth industry. The number of such cases "quadrupled from 2005 to 2010." *Id.* at 3; *accord* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 371 (2011). By 2010, 90 percent of mergers-and-acquisition transactions faced this sort of litigation. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2017 M&A LITIGATION 2 (2018) ("CORNERSTONE 2017 M&A LITIGATION REVIEW"), available at https://stanford.io/2QvQHa4. And the phenomenon continues to this day. *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, A RISING THREAT: THE NEW CLASS ACTION RACKET THAT HARMS INVESTORS AND THE ECONOMY 7–12 (2018) ("RISING THREAT"), *available at* http://bit.ly/2FlslPf.

At first, the cases mostly involved state-law claims brought in state courts, principally in Delaware. But as the years passed, and the abuses became apparent, the Delaware Chancery Court clamped down. Ultimately that court made clear that it would no longer rubber-stamp what it called "'disclosure settlements,' ... the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 887 (Del. Ch. 2016). The Delaware court noted that these settlements "rarely yield genuine benefits for stockholders." *Id.* Declaring that it would be "increasingly vigilant" in scrutinizing such settlements, the Court stated that it would take steps to "guard against potential abuses in [attorneys'] fee demands for mooted representative actions." *Id.* at 887, 898. Other courts, including one federal court of appeals addressing a settlement of state-law claims, have followed suit. *See, e.g., In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) (Posner, J.).

The toughening standards in the Delaware courts over recent years has incentivized plaintiffs' lawyers to migrate to other state courts—and also to federal courts, and also to bring more federal claims. This case exemplifies that trend. By 2017, "the number of M&A deals litigated in federal court increased 20 percent, while state court filings declined." CORNERSTONE 2017 M&A LITIGATION REVIEW, *supra*, at 4. Also by 2017, "74% of M&A deals over $100 million triggered federal securities suits, a 500% increase from 2009." RISING THREAT, *supra*, at 7. And again by 2017, 44 percent of all merger-related disclosure litigation was settled in federal courts, and 100 percent of all mootness attorneys' fees were paid in federal

courts. Matthew D. Cain, *et al.*, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 627 (2018).

If the Ninth Circuit's decision is allowed to stand, this dramatic migration would continue—and would funnel with accelerating speed into the Ninth Circuit. The Ninth Circuit's imposition of a negligence standard under Section 14(e), combined with the broad venue provision contained in the 1934 Act, 15 U.S.C. § 78aa(a), means that any securities plaintiffs' lawyer would be wise to—indeed, would be foolish not to—file an acquisition-related disclosure case in a federal district court in the Ninth Circuit, if any part of the transaction involves a tender offer. The Ninth Circuit's negligence standard essentially makes the PSLRA's heightened pleading standard inoperative, because the whole point of that standard was to require "facts evidencing *scienter*" to be pleaded "with particularity." *Tellabs*, 551 U.S. at 313 (emphasis added). As a result, cases will become extremely difficult to dismiss, which in turn greatly increases their settlement value. So the Ninth Circuit would clearly be the place to go.

At the same time, the cost of executing beneficial business combinations that promote economic growth would increase. Even as matters previously stood before the merger-litigation boom began, securities litigation had already imposed a significant burden on the American economy. For example, in 2012, securities class actions generally led to $2.9 billion in settlements. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2012 REVIEW AND ANALYSIS 3 (2013), *available at* https://stanford.io/2RJHon3. Litigation attending mergers and acquisitions not only adds to that overall burden, *see* RISING THREAT, *supra*,

at 9–10, but also focuses it on a critical choke point in the American economy—the movement of corporate assets to their highest, best, most productive, and most cost-efficient use. The effective result is a "'litigation tax'" on each acquisition—an "additional cost [that] may transform what would have been an economically sensible pro-consumer deal into a non-starter—depriving shareholders, workers, and the economy as a whole of the benefits that the deal would have produced." MERGER TAX, *supra*, at 2. As "[f]or deals that go forward, the 'tax' diverts hundreds of millions of dollars away from shareholders and workers and into the pockets of trial lawyers." *Id.*

In short, the Court should grant certiorari and—either by holding that scienter is required for a private Section 14(e) claim, or by holding that no private right under that section exists at all—prevent the substantial economic harm that the decision below threatens to enhance. And the Court should address the matter now, before the flood of this sort of litigation into the Ninth Circuit becomes too great.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DARYL JOSEFFER
JONATHAN URICK
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463–5337

GEORGE T. CONWAY III
Counsel of Record
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, New York 10019
(212) 403–1260
gtconway@wlrk.com

Counsel for Amicus Curiae

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